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The Evolution of Environmental Law in Louisiana

Charles S. McCowan, Jr.*

I. REGULATORY AUTHORITY PRIOR TO 1921

Prior to 1921, there was no express state constitutional provision authorizing governmental action to protect the environment.¹ The state's authority to regulate such matters was based upon Article 665 of the 1825 Civil Code² and the availability of injunctive relief.³ Early decisions reasoned that governmental authorities had the power and duty to preserve and promote the public health by taking the action necessary to abate a public nuisance.⁴ Louisiana courts used common law principles in de-

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1. As used in this article, the term "environment" encompasses factors that affect the quality of life and which are influenced by discharges into the land, air and water.

2. Article 665 of the 1825 Civil Code is essentially the same as Article 669 of the Revised Civil Code of 1870:

Art. 669. If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

The predecessor, Article 17 of the Civil Code of 1808, "is a more complete and preferable translation of the French text":

The works or other things which every one may make or have in his own grounds, and which send into the apartments of others who dwell in the same house, or into the neighboring houses, a smoke or smells that are offensive, such as the works of tanners and driers, and the other different inconveniencies [inconveniences] which one neighbor may cause to another, ought to be borne with, if the service of them is established, or if there be no service settled, the inconvenience shall either be borne with or hindred [hindered], according as the rules of the police or usage may have provided in said matters.

See history and text, art. 669.

3. In *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164 (1894), the court noted, "The writ of injunction is of the highest character, and should be granted to municipal authority on the broad ground only of preventing irreparable injury, interminable litigation, multiplicity of actions, and the protection of rights."

4. See *Froelicher v. Southern Marine Works*, 118 La. 1077, 43 So. 882 (1907); *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164 (1894).

scribing the type of conduct that constituted a "public nuisance" so as to justify injunctive relief upon a request by a governmental entity.⁵ The courts reasoned that once governmental actions authorized the establishment of a business, the conduct, however inconvenient, did not constitute a "public nuisance."⁶ There are numerous cases, however, in which the

5. Generally, Louisiana courts have distinguished nuisances based upon their character. In that regard, they are considered to be either nuisances *per se*, nuisances in fact, public nuisances or private nuisances. A nuisance *per se*, or absolute nuisance, is "an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Robichaux v. Huppenbauer*, 258 La. 139, 150, 245 So. 2d 385, 389 (1971). In order to establish a right to relief, one need only prove that a nuisance *per se* exists. *Robichaux*, *id.*, 245 So. 2d at 389. Operations undertaken in violation of law are the only type regarded as nuisances *per se*. See *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613, cert. denied, 280 U.S. 556, 50 S. Ct. 16 (1929) (violation of zoning ordinance). Furthermore, "no lawful use made by an individual of his own property is a nuisance *per se*." See also *City of New Orleans v. Lenfant*, 126 La. 455, 462, 52 So. 575, 577 (1910); *Froelicher*, 118 La. at 1086, 43 So. at 886; *Lewis v. Behan, Thorn & Co.*, 28 La. Ann. 130 (1876).

Nuisances *in fact*, on the other hand, "become nuisances by reason of circumstances or surroundings." *Robichaux*, 258 La. at 150, 245 So. 2d at 389 (emphasis added). See also *Froelicher*, 118 La. at 1086, 43 So. at 886. Thus, even though the operation of a business is lawful, it may still be a nuisance if "its operation causes such undue and unreasonable disturbance as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities." *Kellogg v. Mertens*, 30 So. 2d 777, 778 (La. App. 2d Cir. 1947). In determining whether an activity constitutes a nuisance *in fact*, the court will look to "the reasonableness of the conduct in light of the circumstances." *Rodrigue v. Copeland*, 475 So. 2d 1071, 1077 (La. 1975), cert. denied, 475 U.S. 1046, 106 S. Ct. 1262 (1976). Factors to be considered in determining reasonableness include, "[t]he character of the neighborhood, the degree of the intrusion and the effect of the activity on the health and safety of the neighbors." *Rodrigue*, *id.*

Public nuisances are those whose effects are common to every person and which produce no special or particular damage to one person as distinguished from the rest of the public. *Blanc v. Murray*, 36 La. Ann. 162 (1884). Because such a nuisance affects the public as a whole, its abatement may be undertaken only by public officials. However, "[t]he fact that a particular act constitutes a public nuisance does not deprive an individual who suffers a special injury therefrom from having recourse to a private remedy to have it abated." *Barrow v. Gaillardanne*, 122 La. 558, 47 So. 891 (1908).

With regard to alleged pollutants, courts in other jurisdictions have also utilized the concept of "trespass" upon which to base a cause of action. See *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979); *Bradley v. American Smelting & Refining Co.*, 635 F. Supp. 1154 (W.D. Wash. 1986); *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986).

6. See *Lewis v. Behan, Thorn & Co.*, 28 La. Ann. 130 (1876), where injunctive relief was denied despite the operation of a distillery which had been authorized by ordinance. "Smoke from its chimney, when the wind is from a certain point of the compass, fills their (neighbors) houses, blackens the walls thereof, soils their furniture, settles upon the roofs, whence it is carried into their cisterns, thus polluting the water which they use for all family purposes; the nauseating smell which heated grain gives out and infects the air which they breathe." *Id.* Another problem with the applicability of injunctive relief involves the issue of premature nuisance. Hence, until actual injury was imminent, relief was denied. See *City of New Orleans v. Lagasse*, 114 La. 1055, 38 So. 828 (1905).

courts found that "public nuisances" existed so as to justify the use of injunctive relief. These cases involved the validity of early ordinances and action by the State Board of Health⁷ to enjoin the operation of a blacksmith shop which rendered living in the neighborhood inconvenient and unpleasant, on account of noise, odor and smoke;⁸ and, water discharges from a cotton mill which contained fecal and other "offensive, dangerous and injurious matter."⁹ Often times, however, the abatement of environmental nuisances was left to private actions. In such cases, "irreparable injury" was required.¹⁰ When such a finding was made, an injunction to abate the nuisance would issue.¹¹ Even in the absence of irreparable injury, an action for damages was possible as redress for an environmental nuisance.¹²

Since there was no regulatory scheme or permitting procedure to control environmental matters, regulation of sources was left to the Boards of Health,¹³ local ordinances prohibiting certain practices,¹⁴ or local ordinances granting the authority to conduct a particular business.¹⁵ In 1908, the "Board of Commissioners for the Protection of Birds, Game and Fish" was created.¹⁶ This Board evolved into the Conservation Commission and was charged with conserving the natural resources of the state.¹⁷

7. Pursuant to Act 14 of the extra session of 1870, the Board of Health was empowered to take action to remove "any substance, matter or thing which they may deem detrimental to health."

8. *City of New Orleans v. Lambert*, 14 La. Ann. 247 (1859).

9. *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164 (1894).

10. See *Bell v. A. Riggs & Bro.*, 38 La. Ann. 555 (1886) (dealing with a prospective nuisance potentially involving "noise and smoke and steam" from a boiler).

11. See *Naccari v. Rappelet*, 119 La. 272, 44 So. 13 (1907), where the court enjoined the use of shrimp refuse as fertilizer because it emitted a "foul and unbearable stench."

12. See *Froelicher v. Southern Marine Works*, 118 La. 1077, 43 So. 882 (1907).

13. See *supra* note 7.

14. See *Naccari*, 119 La. 272, 44 So. 13 (1907).

15. See *Bell v. A. Riggs & Bro.*, 38 La. Ann. 555 (1886).

16. 1908 La. Acts No. 278.

17. See *State v. Dark*, 195 La. 139, 154, 196 So. 47, 51 (1940), where the court stated: Under the provisions of Act 105 of 1918 the Commissioner of Conservation is granted the power "... [sic] to appoint competent men throughout the State to be known as 'Conservation Agents,' with the authority to carry arms concealed while in the performance of their duties, who shall have full power under the law to enforce all laws for the protection of the natural resources of the State." (Section 2). The act further provides that the Department of Conservation, through its officers and agents, has full power to "... [sic] enforce all laws for the protection of the ... natural resources of the state, and it shall be and is hereby made their duty to arrest and immediately make affidavit against the suspected violators." (Section 3.).

Thus, the first environmental protection officers were, in essence, "game wardens."

II. LOUISIANA CONSTITUTION OF 1921

The redactors of the Louisiana Constitution of 1921 included, for the first time, a constitutional provision concerning the environment.¹⁸ Article VI, Administrative Officers and Boards, Section 1, provided:

Section 1. Department of Conservation—Natural resources. The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof.

This provision was subsequently amended by 1944 Louisiana Acts, No. 328, adopted November 7, 1944, creating the Department of Wildlife and Fisheries, which restated the environmental policy of the State as follows:

Section 1. Wildlife and Fisheries Commission; Forestry Commission; Department of Conservation; powers, duties, functions, etc.
Section 1. The natural resources of the State shall be protected, conserved and replenished.

Article VI Section 1(c) continued the authority of the Commissioner of Conservation over "all other natural resources" other than the wildlife of the state and forestry.

Under the 1921 Constitution, responsibility for environmental matters was spread throughout a number of state agencies, with no central coordination or control. Each of these agencies had some enforcement and regulatory authority over environmental matters. The Wildlife and Fisheries Department had the enforcement duty for water quality violations and water quality monitoring programs.¹⁹ The Department of Health included the Air Control Commission, which had the statutory function of maintaining the "purity" of the air resources of the State of Louisiana, while achieving a balance between "the protection of the health and physical property of the people, maximum employment and the full industrial development of the State."²⁰ The Stream Control Commission, consisting of the Commissioners of Wildlife and Fisheries, Agriculture, Health,

18. B. Dart, *Constitutions of the State of Louisiana*, Art. 6, § 1, at 98 (1932).

19. La. R.S. 56:1451-53 (1952) (repealed 1980).

20. La. R.S. 40:2204 (1977) (repealed 1980).

Commerce and Industry, Conservation, Public Works, and the Attorney General, was charged with the responsibility of adopting water quality criteria for the State's rivers, tributaries, coastal waters and streams discharging into coastal waters.²¹ The Atchafalaya Basin Commission,²² the Commissioner of Agriculture²³ and the State Police²⁴ also had certain areas of environmental concern under their jurisdictions. Each of these organizations had a separate staff and administered its programs and regulations separately.

Early decisions involving Article VI Section 1 of the 1921 Constitution involved the authority of the Conservation Commissioner over the regulation of the oil and gas industry.²⁵ The State's right to control environmental matters was clearly established in 1947 in *Texas Co. v. Montgomery*,²⁶ when a federal court upheld the powers of the Stream Control Commission to prevent pollution and control the disposal of wastes into the waters of the state. Of significance in the decision is the approval of administrative rules and enforcement proceedings with respect to environmental matters.²⁷ State centralization over environmental matters was solidified in *B.W.S. Corp. v. Evangeline Parish Police Jury*,²⁸ when the court held that a parish ordinance prohibiting "The storing, dumping, burying, burning or otherwise disposing of chemical wastes" was found to be a nullity, as the State Board of Health had exclusive jurisdiction over such matters.

III. A CONSTITUTIONAL ENVIRONMENTAL MANDATE IN 1974.

Article IX Section 1 of the Louisiana Constitution of 1974 states the present overall policy with regard to environmental matters:

21. La. R.S. 56:1431-1445 (1952) (repealed 1979).

22. La. R.S. 38:2351-2361 (1989).

23. La. R.S. 3:1621-1642 (1981) (repealed 1982).

24. The State Police's authority was through its general highway regulatory function.

25. *Hunter Co. v. McHugh*, 202 La. 97, 11 So. 2d 495 (1942); *Crichton v. Lee*, 209 La. 561, 25 So. 2d 229 (1946); *Arkansas Louisiana Gas Co. v. Southwest Natural Prod. Co.*, 221 La. 608, 60 So. 2d 9 (1952); *Smith v. Holt*, 223 La. 821, 67 So. 2d 93 (1953).

26. 73 F. Supp. 527 (E.D. La. 1947).

27. The court recognized that the promulgation of administrative rules and regulations was necessary to supplement statutes in environmental matters:

Plaintiff argues that there is no plan or standard fixed in the act for the Commission's guidance and that the Commission is vested with discretion to approve or condemn as it sees fit. The obvious answer is that it would have been impossible for the Legislature to prescribe a formula for the Commission's guidance or to lay down rules with reference to harmful pollution, applicable to all waters: What might be harmful pollution in one body of water might not be harmful pollution in another. Of necessity, a determination of the facts of what might constitute harmful pollution was left to a fact-finding group. The Legislature was compelled to create an agency to administer the act.

73 F. Supp. at 533-34.

28. 293 So. 2d 233 (La. App. 3d Cir. 1974).

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

A review of the records of the Constitutional Convention of 1973 shows that this provision was intended to be a public policy statement on the environment, without an intent to expand legislative authority to establish an agency with judicial power.²⁹ In doing so, the delegates adopted the existing policy statement of Article VI Section 1 of the 1921 Constitution regarding Wildlife and Fisheries. Their purpose was to provide that:

The people of this state are entitled to a clean environment, and it's our feeling that we should protect, conserve and replenish insofar as possible, the natural resources of our state.

... What we attempted to do is to strike a balance, or find a happy medium between the environmentalist on one side, and the agri-industrial interest on the other side. We feel that we have found, hopefully, a policy statement that does this—that strikes a balance, that is not extreme one way or the other. We heard amendments by members of our committee who wanted to provide a citizen with the right to sue in our constitution. In other words, the right to file a suit to close, for example, to seek an injunction to close down some industry, let's say, or . . . The majority of the members of our committee felt that this was an extreme position because there are provisions in our present law, in our civil code, our nuisance laws, class action provisions in our civil code . . . in our Code of Civil Procedure, that provide this. Then, on the other hand, there were members of our committee who felt that to flip the coin completely over and have nothing, say nothing, . . . and after much discussion and much debate on this particular area we came up with the language that you see here So, I assure you that we have debated this at great length and we have made a sincere effort to come up with something that gives you more than what you had in the past, but yet is not so extreme as to jeopardize the operation of industries and businesses in our state.³⁰

29. Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, 103rd Day's Proceedings, December 18, 1973, Vol. IX, 2911-2913.

30. *Id.* at 2911-12.

Following the 1974 constitutional mandate, the legislature enacted Act 720 of 1975³¹ which transferred the Air Control Commission to the Department of Natural Resources and created a new Office of Environmental Quality within that Department. The Office of Conservation remained within the Department of Natural Resources. The Stream Control Commission was left within the Department of Wildlife and Fisheries; the Office of Health Services remained within the Department of Health and retained jurisdiction over "waste disposal." Act 334 of 1978 placed control over hazardous waste disposal with the Department of Natural Resources and authority over hazardous waste transportation with the Department of Public Safety.

Subsequently, Act 449 of 1979, entitled the "Louisiana Environmental Affairs Act,"³² consolidated authority over environmental affairs. This Act abolished the Air Control Commission and the Stream Control Commission after transferring their authority to the Office of Environmental Affairs. In addition, the Office of Health Services' authority over waste disposal was transferred to the Office of Environmental Affairs. This Act had for its stated purpose the evolution of policies for a comprehensive development plan of environmental regulation. In order to achieve that purpose, the Office of Environmental Affairs was given jurisdiction over all matters affecting the regulation of the environment within the state, with the exception of transportation of hazardous materials, which remained with the Department of Public Safety. Thus, the Office of Environmental Affairs became the primary agency charged with the responsibility of regulating water, air, hazardous waste and radiation control.³³

The Environmental Control Commission, within the Office, was given the power and duty to hold hearings, issue orders and determinations, advise and consult with other state agencies, participate in studies and investigations, collect and disseminate information, issue permits and licenses, and "exercise all incidental powers necessary or proper to carry out the purposes of [the office]."³⁴

As a result of a 1983 amendment to the Executive Reorganization Act, the functions of the Department of Natural Resources were divided between the "new" Department of Environmental Quality ("DEQ") and

31. La. R.S. 36:358-359 (Supp. 1976).

32. La. R.S. 30:2001-2396 (formerly numbered La. R.S. 30:1051-1150.96; see the concordance table preceding La. R.S. 30:2001, as extensive re-numbering resulted pursuant to House Concurrent Resolution No. 247 of the 1987 Regular Session).

33. See former La. R.S. 30:1061 (Supp. 1988) (redesignated La. R.S. 30:2011).

34. See La. R.S. 30:1061(C) (Supp. 1980) (La. R.S. 30:2013, effective February 1, 1984, transferred these powers and duties to the Secretary of the Department of Environmental Quality).

the Department of Natural Resources ("DNR").³⁵ Hence, the DEQ is now the primary agency in the state concerned with environmental protection and regulation and has specific jurisdiction to regulate air quality,

35. 1983 La. Acts No. 97, § 2. The Department of Environmental Quality is composed of five offices (Office of Air Quality and Radiation Protection; Office of Water Resources; Office of Solid and Hazardous Waste; Office of Legal Affairs and Enforcement; Office of the Secretary). La. R.S. 30:2011C (1989 and Supp. 1991). There is a Secretary, who is appointed by the Governor with the consent of the Senate. La. R.S. 30:2011B (1989). Each of the first three offices listed is under the immediate supervision and direction of an Assistant Secretary who is also appointed by the Governor with the consent of the Senate. La. R.S. 30:2011C(2) (1989). Among the Secretary's powers and duties are the ability to grant or deny operating permits; to delegate that power to Assistant Secretaries; to hold hearings or meetings on his own motion or upon complaint, for the purpose of fact finding, etc.; to issue orders or determinations as necessary to effectuate the purpose of the Louisiana Environmental Quality Act, including cease and desist orders as provided in La. R.S. 30:2025 (1989); to inspect, investigate, and enter facilities; to assign certain duties to administrative law judges; and "[t]o exercise all incidental powers necessary or proper to carry out the purposes of this Chapter." La. R.S. 30:2011D (1989). The enforcement provision is La. R.S. 30:2025 (1989). It permits the Commission, the Secretary, an Assistant Secretary, or an authorized technical secretary to issue an emergency cease and desist order should it be determined that a violation of the Chapter, which endangers or damages the public health or environment, is occurring or is about to occur. La. R.S. 30:2025C(1) provides that the order remains in effect until a hearing may be held, but in no event longer than fifteen (15) days. The enforcement provision also authorizes civil suits for damage (La. R.S. 30:2025B), compliance orders (La. R.S. 30:2025C), civil penalties (La. R.S. 30:2025E), and criminal penalties (La. R.S. 30:2025F). To meet the requirements of the Revised Statutes, a compliance order must contain a statement of the nature of the violation, a time limit for compliance, and the possibility of assessment of a civil penalty if compliance is not forthcoming. La. R.S. 30:2025D (1989). The civil penalties for a violation of this Chapter may be assessed by the Secretary or the Assistant Secretary of the Department of Environmental Quality, or by the Court, and may include a fine of not more than the response cost to the state and a penalty of not more than \$25,000 per day, provided that intentional violations which cause irreparable injury to the environment or endanger human health can be assessed a penalty of not more than one million dollars. La. R.S. 30:2025E (1989 and Supp. 1991). Criminal penalties are also provided, La. R.S. 30:2025F (1989 and Supp. 1991), along with the revocation or suspension of any permit. La. R.S. 30:2025E (1989 and Supp. 1991). Any penalty assessment must be preceded by both notice and an opportunity for a hearing on the charge. The hearing envisioned by these sections of the Louisiana Revised Statutes may be before the Secretary. However, La. R.S. 30:2018 provides for the selection by the Secretary of Hearing Officers who are empowered to collect evidence, conduct hearings, issue orders, and render decisions with respect to matters assigned to them. A decision of a Hearing Officer is subject to review by the Secretary should a party request it within thirty days. La. R.S. 30:2018D (Supp. 1991). The Secretary may deny the motion, at which time the order or decision shall become final. If the Secretary chooses to grant the party's motion for review, La. R.S. 30:2018D(2) authorizes him to remand the matter with instructions to the Hearing Officer; to overrule the decision or order of the Hearing Officer and to render a contrary decision or order based on the record; or to hold new hearings, collect additional evidence or both and render his own decision or issue his own order.

After the Secretary's review, the Louisiana Revised Statutes provide an aggrieved party's further recourse is by appeal to the Court of Appeal, First Circuit. La. R.S. 30:2024C (1989). See *In re American Waste and Pollution Control Co.*, 588 So. 2d 367 (La. 1991).

noise pollution, water pollution, solid waste disposal, radiation, hazardous waste management, and the protection and preservation of the state's scenic rivers and streams.³⁶

The Department of Natural Resources is still responsible for "conservation, management, and development of water, [and] minerals, . . . including coastal restoration and management."³⁷ Still included within the Department of Natural Resources is the Department of Conservation, which exercises the regulatory functions of the state with respect to the regulation of oil and gas matters.³⁸

*State v. Union Tank Car Co.*³⁹ represented the first comprehensive review of the Louisiana Environmental Affairs Act⁴⁰ by the Louisiana Supreme Court. The court recognized that environmental law is an area "in its infancy, is yet inexact, and consequently is progressively changing."⁴¹ At issue was the constitutionality of the Louisiana Air Control Law⁴² and regulations.⁴³ Following an analysis of the principles of delegation of legislative authority, the court found the law constitutional, as its goal was to protect an environment free from pollution.⁴⁴ However, the regulations were found deficient to support a criminal prosecution based upon penal regulations, as they contained such vague terms as "undesirable levels," "appreciably injure," "beyond inconvenience," "materially injure or interfere," "reasonable use," "acceptable national standards," and "published 'safe limit' values."⁴⁵ While the court recognized it was a "reasonable governmental policy"⁴⁶ to protect the en-

36. *In re Rollins Envtl. Serv., Inc.*, 481 So. 2d 113, 116 (La. 1985); see also *In re Marine Shale Processors, Inc.*, 566 So. 2d 994 (La. App. 1st Cir.), writ denied, 568 So. 2d 1055 (1990).

37. La. R.S. 36:3651B (Supp. 1991).

38. See La. R.S. 36:359, which transferred the Department of Conservation to the Department of Natural Resources. However, the Louisiana Department of Environmental Quality retains authority for water discharges from oil and gas operations pursuant to La. R.S. 30:2071-88.

39. 439 So. 2d 377 (La. 1983).

40. See *supra* note 32.

41. *State v. Union Tank Car Co.*, 439 So. 2d 377, 382 (La. 1983).

42. Formerly La. R.S. 30:1081-1089 (Supp. 1988) (redesignated La. R.S. 30:2051-2060 (1989 and Supp. 1991)).

43. La. Admin. Code 33:III. 101 et seq. The Louisiana Air Quality Regulations, including Louisiana Emission Standards for Hazardous Air Pollutants, are administered by the Department of Environmental Quality, Office of Air Quality and Radiation Protection—Air Quality Division. The regulations also cover control of pollution from sulfur dioxide; control of air pollution from carbon monoxide, hydrocarbons, atmospheric oxidants, nitrogen oxides and smoke; and emissions of particulate matter from fuel burning equipment. DEQ has taken the position that it has authority over air emissions from surface and storage facilities used in oil and gas exploration and production.

44. *Union Tank Car Co.*, 439 So. 2d at 380-84.

45. *Id.* at 385-86.

46. *Id.* at 381.

vironment, such "[l]egislation is not exempt from the due process requirement of definiteness."⁴⁷

IV. A LANDMARK DECISION IN 1984

In 1984, the Louisiana Supreme Court considered *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,⁴⁸ (the "SOS Decision"). This decision has charted the course of environmental regulation for Louisiana's future. Since its rendition in 1984, the case has been cited to support the power of the courts and the Louisiana Department of Environmental Quality to act beyond the express terms of statutory authority in matters involving environmental permitting and regulation.⁴⁹ However, a careful reading of the decision reveals that while the court announced a new standard by which those agencies and officials charged with protecting the environment are governed, it did not grant an unlimited license to the regulatory community. Hence, it is necessary to examine the decision in order to ascertain the proper limitations of regulatory conduct.

In *Save Ourselves, Inc.*, the IT Corporation had applied to the Department of Natural Resources⁵⁰ for a hazardous waste permit and air and water discharge permits in connection with a proposed commercial hazardous waste facility. The attendant publicity, characterizing the plant as the "world's largest," created concern in the environmental community. This led to a number of public interest groups expressing opposition to the facility from the outset of the project. The proceedings took a long and tortuous course through the judicial and administrative systems, with a number of non-environmental issues being litigated.⁵¹

At the time of the initial hearings, the Louisiana Environmental Control Commission was the adjudicatory body with respect to permit proceedings; however, that function has subsequently been assumed by the Louisiana Department of Environmental Quality.⁵² After approximately

47. *Id.* at 387.

48. 452 So. 2d 1152 (La. 1984).

49. See *infra* note 80.

50. See La. R.S. 30:2013 (1989). 1983 La. Acts No. 97 divided responsibilities between the Department of Natural Resources (DNR) and a new Department of Environmental Quality (DEQ) and transferred the responsibilities of the Environmental Control Commission (ECC) from DNR to DEQ. Thus, the functions of the Environmental Control Commission to promulgate regulations and accept, review and act upon permit applications were assumed by DEQ in 1983.

51. See, e.g., *IT Corp. v. Commission on Ethics for Public Employees*, 453 So. 2d 251 (La. App. 1st Cir. 1984), *aff'd*, 464 So. 2d 284 (La. 1985), which involved the applicability of the Code of Governmental Ethics, La. R.S. 42:1101-1169, to private corporations who contract with the state to provide services.

52. See *supra* note 50.

six (6) weeks of hearings, the Environmental Control Commission issued the air, water and hazardous waste permits with special conditions that provided for continued monitoring during the construction process and approval by the regulatory agency.⁵³ An additional permit condition prevented the facility from accepting wastes generated out of state.⁵⁴

The decision of the Environmental Control Commission was affirmed by the 19th Judicial District Court.⁵⁵ On appeal, the Louisiana First Circuit Court of Appeal⁵⁶ followed recognized principles in reviewing the decision of an administrative agency by confining its review to the extensive record⁵⁷ and according a presumption of validity to the administrative agency's

53. Permit Condition "X" of the Hazardous Waste Permit provided that construction plans had to be submitted for approval prior to actual construction and there were provisions in the permit for trial burns prior to commercial operation.

54. But see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978).

55. See *supra* note 35.

56. *Save Our Selves, Inc. v. Louisiana Envtl. Control Comm'n*, 430 So. 2d 1114 (La. App. 1st Cir. 1983).

57. See, e.g., *Buras v. Board of Trustees of Police Pension Fund*, 367 So. 2d 849 (La. 1979). La. R.S. 49:964F and G provide:

The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provision;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

In *Louisiana Chemical Ass'n v. DEQ*, 577 So. 2d 230 (La. App. 1st Cir. 1991), the court noted:

The scope of judicial review under the Administrative Procedure Act is confined to review of the record of the agency; it does not involve trial de novo. *Pardue v. Stephens*, 558 So.2d 1149 (La. App. 1st Cir. 1989). The purpose of so limiting the scope of review is to prevent the reviewing court from usurping the power delegated to the agency by the legislature. *Buras v. Board of Trustees of the Police Pension Fund*, 367 So.2d 849 (La. 1979); *Pardue*, 558 So.2d at 1160. Trial de novo by a district court of an agency decision or action is only available where a special statute specifically provides for such. *Pardue*, 558 So.2d at 1160.

actions⁵⁸ on matters within its area of expertise.⁵⁹ By limiting its review to these recognized standards, the court of appeal concluded that the award of the permits was not an abuse of administrative discretion. On writs, however, on the basis of Article IX, Section 1, of the 1974 Constitution, the Louisiana Supreme Court⁶⁰ imposed on all state agencies with environmental responsibilities, as a matter of policy, a "public trust doctrine" in reviewing or taking actions which could have an adverse effect on the environment.⁶¹ Pursuant to this public trust doctrine, a

58. See, e.g., *First Nat'l Bank v. Sehart*, 246 So. 2d 382 (La. App. 1st Cir.), writ refused, 258 La. 909, 248 So. 2d 334 (1971).

When an administrative agency is the trier of fact, such as in enforcement or permit actions, the court will not review the evidence before such a body except for the limited purposes illustrated by *Allen v. LaSalle Parish School Board*, 341 So. 2d 73 (La. App. 3d Cir. 1976), writ refused, 343 So. 2d 203 (1977):

The jurisprudence of our state is abundantly clear that where an administrative agency or hearing body is the trier of fact the courts will not review the evidence before such body except for the following limited purposes: (1) to determine if the hearing was conducted in accordance with the authority and formalities of the statute; (2) to determine whether or not the fact findings of the body were supported by substantial evidence; and, (3) whether or not the hearing body's conclusions from these factual findings were arbitrary or constituted an abuse of the hearing body's discretion.

And, again, in *Celestine v. Lafayette Parish School Board*, 284 So. 2d 650 (La. App. 3d Cir. 1973), the court noted:

When there is a rational basis for an administrative board's discretionary determinations which are supported by substantial evidence insofar as factually required, the Court has no right to substitute its judgment for the administrative board's or to interfere with the latter's bona fide exercise of its discretion.

59. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545-46, 98 S. Ct. 1197, 1212-13 (1978); *Oilfield Safety & Machine Specialties, Inc. v. Harmon Unlimited, Inc.*, 625 F.2d 1248 (5th Cir. 1980).

60. *Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n*, 452 So. 2d 1152 (La. 1984).

61. See Nelea A. Absher, Note, *Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n*, 59 Tul. L. Rev. 1557 (1985). In *Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n*, the court stated the "public trust" doctrine as follows:

A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by art. VI, § 1 of the 1921 Louisiana Constitution. The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy.

.....
In implementation of the public trust mandate, the legislature enacted the Louisiana Environmental Affairs Act.

.....
In summary, the Natural Resources article of the 1974 Louisiana Constitution

requirement was imposed on state agencies, "before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."⁶² The court cautioned, however, that its decision was not to be interpreted as establishing environmental protection as an exclusive goal. There was to be an active participation by the administrative agencies in a "balancing process" between environmental costs and economic and social factors. Thus, a judicial standard of review was fashioned in cases involving the "public trust" to the effect that the reviewing court would "not supply a finding from the evidence or a reasoned basis for the commission's action that the commission has not found or given."⁶³ The court remanded the matter to the agency, as

imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement fully this policy.

.....

The constitutional standard requires environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1. This is a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.

.....

The constitutional-statutory scheme implies several other important principles. Since the ECC, in effect, has been designated to act as the primary public trustee of natural resources and the environment in protecting them from hazardous waste pollution, it necessarily follows that the agency must act with diligence, fairness and faithfulness to protect this particular public interest in the resources. See *W. Rodgers, Environmental Law* § 2.16 (1977); *1 V. Yannacone & B. Cohen, Environmental Rights and Remedies* § 2.1 (1972). Consequently, the commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.

.....

The environmental protection framework vests in the Commission a latitude of discretion to determine the substantive results in each particular case. Environmental amenities will often be in conflict with economic and social considerations. To consider the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and social benefits and in other instances they may not. This leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.

62. *Save Ourselves, Inc.*, 452 So. 2d at 1157.

63. *Id.* at 1160. This approach was apparently adopted from the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321, et seq.

it could not determine from the record whether the agency discharged its "public trustee" function by considering the balancing test. In doing so, however, the court went one step further in defining the requisites of the public trustee concept by requiring a full statement by the agency as to whether it considered alternate projects, alternate sites, or mitigative measures which "would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits."⁶⁴ It is important to note that the court did not expressly impose any fixed criteria, nor did it extend the "balancing process" to all aspects of environmental regulatory action.

On remand, DEQ interpreted its "public trustee" charge in an expansive manner by requiring the permit applicant to affirmatively demonstrate whether:

1. The potential and real adverse environmental effects of the proposed facility have been avoided to the maximum extent possible.⁶⁵
2. A cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrates that the latter outweighs the former.⁶⁶

64. *Id.* at 1157.

65. With reference to the issue of whether adverse environmental impacts have been minimized or avoided, it is critical to remember that the supreme court in the *SOS* Decision did not phrase the inquiry identical to the DEQ's "IT Questions." DEQ seems to require a showing by the applicant that "potential and real" effects have been avoided to the "maximum extent possible." The court, however, required only that the *agency* determine that "adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." 452 So. 2d at 1157. Thus, there appears to be no jurisprudential basis for the more stringent DEQ requirements of addressing "potential" effects or "maximum" minimization of risk. Further, the court's requirement of an agency determination that adverse effects have been "minimized or avoided as much as possible" is more reasonable and possible to show by relevant evidence than DEQ's "maximum extent possible" requirement.

"Potential" effects must be quantified in terms of probability and the safeguards of the project related in terms of redundancy and unnecessary cost in view of the possibility of danger. It must be remembered that the supreme court did not prohibit projects which do not meet the test. The *SOS* Decision merely required a determination of whether there could be "more protection for the environment than the project as proposed" would offer without, "unduly curtailing non-environmental benefits." 452 So. 2d at 1157. The additional protections needed in order to meet the test case may be required by permit conditions. With respect to the foregoing inquiries, it appears that relevant testimony should be elicited to show the potential for harm created by the proposed construction and the deviation from the statutory requirements necessary to pose a *real* risk to the environment. Considerations involved in determining the "potential for harm" include the likelihood of exposure to hazardous materials in sufficient quantities to create a real risk of adverse effects on animals, humans, and adverse environmental consequences, and the quantity of wastes that would have to be involved and the probability of circumstances which would have to exist in order to create such a risk.

66. The supreme court required a balancing of "environmental costs" and "economic

3. There are alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing nonenvironmental benefits.⁶⁷

These issues have become generally known as the "IT Questions,"⁶⁸ and pursuant to the "public trustee concept," the "IT Questions" have

and social *benefits*." The term "environmental costs" is not defined. It is suggested, however, that it should be limited to considerations similar to a determination of the "potential for harm" and not include the cost of enforcement, which would be the subject of subsequent actions to recover such costs, or remote possibilities of environmental harm. The *SOS* Decision makes it clear that an agency determination should not be reversed on the merits "unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection." 452 So. 2d at 1159. The DEQ's "IT Questions" phrase the cost-benefit requirement in similar language. Neither requires proof of economic or social *costs*. Thus, it appears unnecessary to produce proof of indirect community costs such as the increased cost of fire protection, public safety or educational costs incurred through an increased work force that would result from the project. The requirement does, however, seem to necessitate expert economic testimony concerning the *benefits* of the project on the tax basis of the community and the impact of additional jobs on the local economy. Similarly, testimony concerning any "environmental costs" mitigated through new, modern state of the art techniques is relevant. See also *In re Cecos Int'l, Inc.*, 574 So. 2d 385 (La. App. 1st Cir. 1990), writ denied, 576 So. 2d 18 (1991), where the Court discussed the "standard of review" in light of the *SOS* Decision.

67. The alternate projects, sites, and mitigating measures requirements of both the *SOS* Decision and the DEQ "IT Questions" are not absolute requirements. Just because alternate sites, projects or mitigating measures are available does not automatically disqualify the project. It must be remembered that the availability of alternate projects, sites and mitigating measures must be balanced against the "nonenvironmental benefits" of rejecting one of the available alternatives. Possible alternatives must be feasible and economically justifiable. Although the term "nonenvironmental benefits" is not defined, it appears reasonable to conclude that it encompasses the fiscal impact on both industry and the community by approving or denying a permit application. In many instances, the consequences of denying an application, or requiring redundant safety measures, can mean the continuation or closure, construction or abandonment of the facility or project. The economic and social consequences of such action can be significant and should be a matter of record.

68. Courts have rephrased the IT Questions, as illustrated by *Blackett v. Louisiana Dep't of Env'tl. Quality*, 506 So. 2d 749, 753-54 (La. App. 1st Cir. 1987):

The Louisiana Supreme Court, in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984) (IT Decision), articulated five issues to be addressed when reviewing an administrative record: First, have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible?; Second, does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighs the former?; Third, are there alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits?; Fourth, are there alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits?; Fifth, are there mitigating measures which would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits?

now been imposed on all permit applications by regulation⁶⁹ and have been utilized by the courts in reviewing environmentally related matters.

V. JURISPRUDENTIAL RELIANCE ON THE SOS DECISION

Ironically (because the Environmental Control Commission's permit action was reversed), shortly following the rendition of the SOS Decision, the Louisiana Supreme Court cited it for authority that administrative action should not be disturbed unless arbitrary, capricious, or characterized by an abuse of discretion.⁷⁰ The SOS Decision is also frequently cited for the proposition that courts will not supply findings of fact for administrative agencies where the reasoned basis for the agency's action is not in the record.⁷¹

In *Blackett v. Louisiana Department of Environmental Quality*,⁷² a solid waste permit had been granted by DEQ. Neighboring landowners contested the granting of the permit. The court recognized the necessity of the agency addressing each of the "IT Questions." In affirming the issuance of the permit, the Louisiana First Circuit Court of Appeal noted that:

Environmental amenities will often be in conflict with economic and social considerations. To consider the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and social benefits and in other instances they may not. This leaves room

69. La. Admin. Code 33:IX.303 (1988) specifically sets forth the requirements with respect to water discharge permits, and DEQ has administratively interpreted solid waste (33:VII:1107), air (33:III:505) and hazardous waste (33:V:501-537) permit regulations as requiring an evaluation of these issues. However, DEQ's interpretation regarding hazardous waste differs from federal cases under the National Environmental Policy Act, *supra*. See *State of Alabama v. United States Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990).

70. *Walters v. Department of Police*, 454 So. 2d 106 (La. 1984); see also *Cecos*, 574 So. 2d 385; *Garcia v. State Dep't of Labor*, 521 So. 2d 608, 612 (La. App. 1st Cir. 1988); *Johnson v. Odom*, 536 So. 2d 541, 546-47 (La. App. 1st Cir. 1988), writ denied, 537 So. 2d 213 (1989). In *Cecos*, *supra*, the court noted:

The appropriate standard of review to be used by a court when reviewing an environmental agency decision is the standard of judicial review provided by LSA-R.S. 49:964. Save Ourselves, 452 So.2d at 1158. *Unless this court finds a fatal error of law, substantive or procedural, or the agency has committed manifest error in its findings or abuses its discretion in exercising its authority, we cannot reverse. See Sistler v. Liberty Mutual Insurance Company*, 558 So.2d 1106, 1111-12 (La. 1990); *Save Ourselves*, 452 So.2d at 1158-59.

574 So.2d at 389 (emphasis added).

71. See *Hay v. South Cent. Bell Tel. Co.*, 475 So. 2d 1052 (La. 1985); cf. *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987).

72. 506 So. 2d 749 (La. App. 1st Cir. 1987).

for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.⁷³

Utilizing this rather vague standard of review, the court concluded in this particular instance that, "[The court] cannot say DEQ's decision in this regard was arbitrary or capricious."⁷⁴ Thus, while recognizing an "arbitrary and capricious" standard of review, the court nevertheless utilized the "IT Questions" in evaluating the agency action.

The SOS Decision was utilized as justification to opine that citizens' groups who can show they are aggrieved may intervene and appeal⁷⁵ administrative penalty assessments⁷⁶ in *In re BASF*

73. Id. at 754-55.

74. Id. at 755. A similar result was reached in *In re Shreveport Sanitary & Industrial Landfill*, 521 So. 2d 710 (La. App. 1st Cir. 1988). However, there, the court noted that the SOS Decision involved the disposal of hazardous waste and that therefore the facts with respect to a solid landfill permit case were inapposite. Nevertheless the court found the SOS "balancing test" had been met. 521 So. 2d at 713.

75. See *supra* note 35. See also La. R.S. 30:2024 (1989).

76. La. R.S. 30:2025 (1989). A showing of actual damages to the environment is not required for the assessment of a civil penalty. *Office of Environmental Affairs v. McWhorter and Associates, Inc.*, 449 So. 2d 1062 (La. App. 1st Cir. 1984); *In re McGowan*, 533 So. 2d 999 (La. App. 1st Cir. 1988), writ denied, 537 So. 2d 1168, cert. denied, 493 U.S. 822, 110 S. Ct. 80 (1989).

La. R.S. 30:2025E(3)(a) contains the following *mandatory* factors to be considered in determining whether or not a civil penalty is to be imposed and in arriving at the penalty or an amount agreed in compromise:

- (i) The history of previous violations or repeated noncompliance.
- (ii) The nature and gravity of the violation.
- (iii) The gross revenues generated by the respondent.
- (iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.
- (v) The monetary benefits realized through noncompliance.
- (vi) The degree of risk to human health or property caused by the violation.
- (vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.
- (viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation.
- (ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

While the Secretary is authorized to "supplement such criteria by rule," La. R.S. 30:2025E(3)(b), to date DEQ has not adopted a *formal* civil penalty policy. See e.g., *In the Matter of Evans*, No. SE-P-90-0247, La. DEQ, in which the Administrative Law Judge held:

The Civil Penalty Policy of the Solid Waste Division is designed to be used in determining the liability of a violator of the Act. By its own terms, it is the "policy procedure for assessing administrative penalties" in the Solid Waste Division. The Policy is used by the Division to calculate the civil penalty to be assessed against a violator of the environmental laws of the state. The Division uses the Policy to

implement the statutorily required consideration of the nine factors listed in *LSA R.S. 30:2025(E)(3)(a)*.

...
These characteristics of the Policy reflect the characteristics of a rule as defined by *LSA R.S. 49:951(6)* almost identically. The Policy is used expressly for the implementation of the substantive law governing the calculation of a civil penalty. It clarifies the relative roles of the factors in *LSA R.S. 30:2025(E)(3)(a)* to be used in calculating a penalty. It also expressly prescribes the procedure for the agency to calculate the penalty. The Policy substantially impacts the members of a certain class by prescribing the method for assessing the amount of penalties on violators of the Environmental Quality Act. These characteristics fit exactly within the language found in the definition of a rule. Thus, the Civil Penalty Policy adopted by the Solid Waste Division is a rule under the definition in the Louisiana Administrative Procedure Act.

The Department admits that it has not followed the procedure required for the promulgation of a rule in the creation of the Policy. They have chosen to defend the validity of the Policy on the grounds that the Policy is exempt from the rulemaking requirements because the Policy is a guide for the internal management of the agency. The Policy is not an internal management document of the agency because its effect is not limited to the agency and its implementation substantially affects the regulated community. The Policy affects the class of the general public who are found to violate the Environmental Quality Act. For the Policy to be a guide for the internal management of the agency, it would have to relate to such matters as operations of the agency staff, administration, and financing. Since the rule has not been correctly promulgated, it is without effect. *LSA R.S. 49:954*.

Nevertheless the criteria set forth above mandate consideration of the following broad areas and allow consideration of the subtopics shown:

- I. *HISTORY OF PREVIOUS VIOLATIONS*
 - A. Nature of Violation
 - B. Severity of the Violation
 - C. Previous Penalty or Responses by the Company
 - D. Repeat or Similar Violations
 - E. Recentness of Previous Violations
 - F. Number of Previous Violations of This Type
- II. *NATURE AND GRAVITY OF PRESENT VIOLATIONS*
 - A. The Amount of Pollutant
 - B. Toxicity of Pollutant
 - C. The Sensitivity of the Environment
 - D. The Length of Time the Violation Continues
 - E. Activities Done to Prevent Violation
 - F. Unforeseeable Events or Outside Forces
 - G. Intentional or Oversight
 - H. Ease of Prevention: i.e. Specific Activities Which Could Have Prevented Violation
 - I. Actual Environmental Harm
 1. Short Term
 2. Long Term
 - J. Provability
- III. *GROSS REVENUE*
 - A. Ability to Pay
 - B. Significance of the Violation From an Economic Standpoint
- IV. *DEGREE OF CULPABILITY, RECALCITRANCE, DEFIANCE OR*

INDIFFERENCE

- A. Amount of Control the Violator Had Over Events
- B. Foreseeability of Events
- C. Reasonable Precautions
- D. Knowledge of Violations
- E. Historic Actions
- F. Cooperation in Inspection
- G. Cooperation in Supplying Information

V. MONETARY BENEFIT THROUGH NON-COMPLIANCE**VI. DEGREE OF RISK**

- A. Short Term
- B. Long Term
- C. Synergistic Effects

VII. REPORTING

- A. Immediate
- B. Concealment
- C. Attempted Concealment

VIII. MITIGATION OF DAMAGES**IX. COST OF ENFORCEMENT**

- A. Cost of Investigation
- B. Lab Cost
- C. Personnel
- D. Administrative Costs

The Louisiana Hazardous Waste Regulations also contain supplemental enforcement provisions (La. Admin. Code 33:V.107) which authorize fact finding investigations and subsequent enforcement actions under Section 2025. There is a requirement of a written investigative report by the agency. Similarly, Chapter 3 of the Water Pollution Control Regulations contains supplementary enforcement provisions. It is significant to note that under these provisions, any actual or potential economic losses resulting from the necessity to halt or reduce a permitted activity in order to maintain compliance with permit conditions is not a defense to an enforcement action. The section grants investigative powers to the Secretary, including the right of inspection and to issue subpoena for the production of documents. Written reports of the investigation are required. It is significant to note that the enforcement provisions of the water regulations (La. Admin. Code 33:IX.505) require the assessment of penalties to be made "*with consideration for the fair and equitable treatment of the regulated community.*" Thus, it appears to be a relevant inquiry in such enforcement actions, as to the penalty imposed by the Department in similar cases. The monthly DEQ newsletter lists such actions and the penalty involved. The subsection also allows consideration of the gravity of the offense, the economic benefit of non-compliance, the operator's standard of care, the size and toxicity of the discharge, ability to pay and the degree of damages incurred. Again, proof should be required of the Department, and presented by the alleged offender, of each of these elements. The Louisiana Solid Waste Rules and Regulations (La. Admin. Code 33:VII. Ch. 15) contain similar enforcement provisions, which require a written report of the facts of any investigation. These provisions also authorize public hearings with respect to such investigations. However, the "fair and equitable" penalty provision is not included in the Solid Waste Regulations. The Air Quality Regulations (La. Admin. Code 33:III.107) contain similar, but not identical, provisions.

*Corp.*⁷⁷ Additionally, the "public trustee" rationale has been used to invalidate oyster and shell leases that were granted contrary to public bid procedures⁷⁸ and to support the decisions of the Commissioner of Conservation with respect to the marketing of, and accounting for, gas productions of compulsory drilling and production units in a natural gas field.⁷⁹

It has even been suggested that the "IT Questions" can form the basis of the nullification of private contractual provisions or the basis for the imposition of liability in civil litigation. *Butler v. Baber*⁸⁰ involved an oyster lessee who sued a mineral lessee to recover for damages as a result of dredging a canal for use in drilling an oil well. The majority of the court imposed liability on the basis of the applicability of Civil Code article 667 to leases. Justice Dennis, however, in a concurring opinion, indicated that the court's interpretation of the duties imposed by Article IX Section 1 of the 1974 Constitution "should be considered by the courts in formulating the standard of liability, along with the codal, statutory and secondary sources" available to an aggrieved party. Following this reasoning, the concurring opinion⁸¹ found that a consideration of the "IT Questions" of alternate means was an appropriate inquiry in civil litigation involving state mineral leases.

VI. OTHER STATE STATUTES AND REGULATIONS OF INTEREST IN ENVIRONMENTAL MATTERS

The Louisiana Hazardous Waste Regulations⁸² were adopted as a part of the program to develop a comprehensive Hazardous Waste Management Program for the state. They are primarily based upon the EPA's Resource Conservation and Recovery Act ("RCRA")⁸³ regulations. They are administered by the Department of Environmental Quality, Office of Solid and Hazardous Waste, Hazardous Waste Division. DEQ has also obtained authority to administer the Federal RCRA pro-

77. 528 So. 2d 162 (La. App. 1st Cir. 1988). It should be noted that on the subsequent consideration, the court found that intervention, under the circumstances, was not appropriate. However, the court also found that the settlement of a penalty assessment under La. R.S. 30:2025 required the concurrence of the Attorney General. 538 So. 2d 635 (La. App. 1st Cir.), writ denied, 539 So. 2d 624 and 541 So. 2d 900 (1989).

78. *Sierra Club v. Louisiana Dep't of Wildlife and Fisheries*, 519 So. 2d 836 (La. App. 4th Cir.), writs denied, 521 So. 2d 1151 and 521 So. 2d 1152 (1988).

79. See *Amoco Prod. Co. v. Thompson*, 566 So. 2d 138 (La. App. 1st Cir.), writs denied, 571 So. 2d 627 and 571 So. 2d 628 (1990).

80. 529 So. 2d 374 (La. 1988).

81. *Id.* at 382.

82. La. Admin. Code 33:V.101-5133 (1990).

83. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6907, 6911-6916, 6921-6931, 6941-6949, 6951-6954, 6961-6964, 6971-6979, 6981-6987 (1988).

gram. The regulations include provisions for permits for treatment, storage and disposal facilities; permit application contents; manifest systems; regulations governing generators, transporters, and treatment, storage and disposal facilities; requirements for tanks, containers, waste piles, landfills, land treatment, surface impoundments, incinerators, groundwater monitoring, closure and postclosure; and financial requirements.

The Louisiana Solid Waste Rules and Regulations⁸⁴ are administered by the Department of Environmental Quality, Office of Solid and Hazardous Waste, Solid Waste Division. There is a specific exemption for "[p]roduced waste fluids and muds resulting from the exploration for or production of petroleum and geothermal energy, and all surface and storage waste facilities incidental to oil and gas exploration and production. . . ."⁸⁵

However, the scope of the regulations makes it possible that they may apply to discharges from the drilling site. The regulations define "solid waste" to mean, "any garbage, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations." A "facility" includes "any land and appurtenances thereto used for storage, processing and/or disposal of solid wastes."⁸⁶

The Louisiana Air Quality Regulations,⁸⁷ including Louisiana Emission Standards for Hazardous Air Pollutants and the air toxics program, are administered by the Department of Environmental Quality, Office of Air Quality and Radiation, Air Quality Division. The regulations also cover control of pollution from sulfur dioxide; control of air pollution from carbon monoxide, hydrocarbons, atmospheric oxidants, nitrogen oxides and smoke; and emissions of particulate matter from fuel burning equipment. DEQ has taken the position that it has authority over air emissions from surface and storage facilities used in oil and gas exploration and production.

Comprehensive Water Pollution Control Regulations have been adopted. These regulations represent a consolidation of the old Regulations of the Stream Control Commission, Louisiana Water Quality Criteria and Louisiana Procedures for Water Control Certifications. The regulations contain comprehensive definitions, permit procedures, effluent standards, spill prevention and control rules, and enforcement provisions.⁸⁸

84. La. Admin. Code 33:VII.101-1507 (1988).

85. La. Admin. Code 33:VII.701A(3) (1988).

86. La. Admin. Code 33:VII.501 (1988).

87. La. Admin. Code 33:III.101-6523 (1988).

88. La. Admin. Code 33:IX.101 et seq.

Legislative efforts to provide protection for the environment have not been exclusively addressed to the Department of Environmental Quality. The State and Local Coastal Resources Management Act of 1978⁸⁹ prohibits the commencement of certain activities "of state or local concern" in the coastal zone without a coastal use permit. Activities of state concern specifically include all mineral exploration and production activities, including dredging and filling, and laying of pipelines. The coastal zone basically includes all of South Louisiana along the Intracoastal Waterway, the Gulf Intracoastal Waterway and certain other areas extending as far north as East Baton Rouge Parish south of Interstate 10. The Coastal Management Program is administered by the Secretary of the Department of Natural Resources. The Act also provides that drilling and exploration permits issued by the Office of Conservation shall be in lieu of a coastal use permit, provided the Office of Conservation insures that the permitted activities are conducted in accordance with the coastal zone management guidelines.

The Louisiana Scenic Rivers Act⁹⁰ prohibits the channelization, clearing, realignment or reservoir construction of any stream or river designated under the Act. Fifty-one (51) such streams or segments thereof are designated. Furthermore, the Louisiana Attorney General has opined that tributaries of these streams are also covered.⁹¹ In addition, the Act requires any state, local, or federal agency to consider the environmental impact on any such stream prior to authorizing any use of the waterbody or any development of "water related" land resources. The Department of Wildlife and Fisheries, the Office of State Planning, and the Louisiana Recreation Advisory Council have authority to implement this law.

The Hazardous Materials Transportation and Motor Carrier Safety Act⁹² establishes mandatory insurance coverage limits, and inspection authority is granted to the Department of Public Safety and Corrections (DPSC) for the transportation of hazardous materials. DPSC is also responsible for permitting procedures, reporting of incidents and accidents, and driver qualifications. In this connection, the definition of "hazardous materials" contained in the regulations is broad.⁹³

89. La. R.S. 49:214.21-214.41 (Supp. 1991).

90. La. R.S. 56:1840-1856 (Supp. 1991).

91. Op. Att'y Gen. 264 (1973).

92. La. R.S. 32:1501-1520 (1989 and Supp. 1991).

93. "Hazardous material" means any gaseous, liquid or solid material which, because of its quantity, concentration, physical, chemical, or biological concentration, poses a substantial presence of a potential hazard to human health, the environment, or property when transported in commerce and which is identified and designated as being hazardous by rules prescribed by the Secretary pursuant to Section 2.2 of Part II.

"Hazardous waste" means a solid waste or combination of wastes which, because of

Pursuant to the 1983 amendment to the Reorganization of the Executive Branch of State Government Act, the functions of the Department of Conservation were maintained in the Department of Natural Resources.⁹⁴ With respect to environmental concerns, the Conservation Commissioner had the authority:

(1) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into oil or gas strata; to prevent the pollution of fresh water supplies by oil, gas, or salt water . . . ; and to require reasonable bond with security for the performance of the duty to plug each dry or abandoned well;

....

(3) To prevent wells from being drilled, operated, and produced in a manner to cause injury to neighboring leases or property;

....

(6) To prevent blow outs, caving and seepage . . . ;

(7) To prevent fires;

....

(9) To regulate the shooting and chemical treatment of wells; and

....

(16) To regulate . . . the drilling . . . monitoring . . . and permitting of disposal wells . . . and to regulate all surface and storage waste facilities incidental to oil and gas exploration and production, in such a manner as to prevent the escape of such waste product into a freshground water aquifer or into oil or gas strata. . . .⁹⁵

quantity, concentration, or physical, chemical or infectious characteristics, may

(a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

(b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

La. R.S. 30:2173(2) (Supp. 1991).

94. See *supra* note 31.

95. La. R.S. 30:4 (1989 and Supp. 1991). In *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991), the supreme court recognized that La. R.S. 30:4(c)(16)(a) gave the Commissioner of Conservation jurisdiction over site clean up of abandoned and unused wells. However, a civil action for damages due to the failure to properly clean the site was found to be a matter of "private law" and exclusively within the jurisdiction of the courts. The court suggested that a private action may not be appropriate if there was no financially responsible owner or operator, as defined in the Abandoned Oilfield Waste Site Law, La. R.S. 30:71-78 (1989 and Supp. 1991).

It should be noted that in 1983, Act 97 transferred primary authority to regulate hazardous waste injection wells to DEQ, although the Office of Conservation was to act as a consultant to DEQ on these wells. However, the former Louisiana Revised Statutes 30:1136, now Louisiana Revised Statutes 30:2180, was amended in 1984⁹⁶ in order to eliminate the Department of Environmental Quality's authority to regulate underground injection and disposal wells and to provide for the regulation of surface activities on those wells only.⁹⁷ Thus, DNR now has authority over the drilling of all wells. DEQ has authority over surface and storage facilities associated with hazardous waste injection wells. DNR, through the Office of Conservation, has authority over surface and storage facilities associated with oil and gas exploration and production facilities.

In furtherance of the Office of Conservation's authority over the regulation of the oil and gas industry, Statewide Order No. 29-B, as amended, has been promulgated.⁹⁸ The Order, originally adopted in 1951, contains provisions with respect to drilling application requirements, record submissions, casing programs, blow-out preventers, casing heads, fire hazards, drilling fluids, pollution control and plugging requirements.

Section XV of Statewide Order No. 29-B contains the pollution control provisions of the Order. It governs on-site storage, treatment, and disposal of nonhazardous oilfield wastes generated from the drilling and production of oil and gas wells.⁹⁹

96. 1984 La. Acts No. 795, § 1.

97. La. R.S. 30:2180A(6) (1989).

98. Statewide Order No. 29-B has been codified at La. Admin. Code 43:XIX.129B.

99. Such wastes include the following:

1. Salt water (produced brine or produced water), except for salt water whose intended and actual use is in drilling, workover or completion fluids or enhanced mineral recovery operations.
2. Oil base drilling mud and cuttings.
3. Water base drilling mud and cuttings.
4. Drilling, workover and completion fluids.
5. Production pit sludges.
6. Production storage tank sludges.
7. Produced oily sands and solids.
8. Produced formation fresh water.
9. Rainwater from ring levees and pits at production and drilling facilities.
10. Washout water generated from the cleaning of vessels (barges, tanks, etc.) that transport nonhazardous oilfield waste and are not contaminated by hazardous waste or material.
11. Washout pit water from oilfield related carriers that are not permitted to haul hazardous waste or material.
12. Nonhazardous natural gas plant processing waste which is or may be commingled with produced formation water.
13. Waste from approved salvage oil operators who only receive waste oil (BS&W)

The Order sets forth criteria for both on-site disposal and off-site commercial facilities and establishes permit criteria for off-site commercial facilities. There is a public hearing required in the permit process for off-site facilities. Additionally, operational criteria and notification requirements are set forth in the Order. A manifest system, monitoring and land treatment facility requirements are explained in detail in the Order.

VII. CONCLUSION

Louisiana, often maligned with respect to environmental problems, has made great strides in an effort to provide a statewide comprehensive system of legislation and regulations governing environmental issues. There has been a movement toward the centralization of control in the Louisiana Department of Environmental Quality. The "public trustee" concept has added environmental awareness throughout state government and the private sector has become more environmentally sensitive because of the administrative permitting and enforcement activities. The introduction of the exemplary damage provision of Article 2315.3 for the reckless handling of hazardous or toxic substances and,¹⁰⁰ increased civil and criminal sanctions have provided an added incentive for compliance. Additionally, reporting of violations is encouraged by the enactment of Louisiana Revised Statutes 30:2027 entitled "Environmental Violations Reported By Employees; Reprisals Prohibited." This statute establishes a cause of action by an employee for triple damages sustained as a result of adverse action by an employer for "report[ing] or complain[ing] about possible environmental violations."¹⁰¹ The triple damages to which an employee is entitled include actual or "anticipated wage" loss and emotional damage. This cause of action is novel to Louisiana jurisprudence.

from oil and gas leases.

14. Pipeline test water which does not meet discharge limitations established by the appropriate state agency, or pipeline pit water, i.e., waste fluids generated from the cleaning of a pipeline.
15. Wastes from permitted commercial facilities.
16. Material used in crude oil spill clean-up operations.
100. La. Civil Code art. 2315.3. Additional damages, storage, handling, and transportation of hazardous substances:

In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substances shall not include electricity.

101. The significance of the statute is that the term "adverse action" is defined as including "firing, layoff, lockout, loss of promotion, loss of raise, loss of present position, loss of job duties or responsibilities, imposition of onerous duties or responsibilities. . . ."

Louisiana's environmental laws and regulations are here forever. The economic community, industry and environmental groups must take cognizance of them and strive for compliance in order to make future operations environmentally sound and economically possible.